No. 75-827

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

DONALD H. WOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-327

DONALD H. WOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision of the Court of Claims sustaining his separation from government service as the result of a reduction-in-force.

Until 1972, petitioner was employed as an "Intelligence Research Specialist (Cultural Geography)" with the Defense Intelligence Agency of the Department of Defense. In that year, petitioner was separated from government service following a reduction-in-force which abolished his position. Petitioner contested his separation and unsuccessfully pursued his

administrative remedies before the Appeals Examining Office of the Civil Service Commission ("the Commission") and the Commission's Board of Appeals and Review.

Petitioner then brought this action for lost wages in the United States Court of Claims. The court granted the government's motion for summary judgment and dismissed the petition, stating (Pet. App. 2a):

> We find no violation of applicable law or regulations, no lack of substantial evidence as to the correctness of the adverse administrative decision by the Civil Service Commission, and no arbitrary, capricious or grossly erroneous action or bad faith which would vitiate that decision * * *.

The decision of the court below was correct, and petitioner has advanced no claim warranting further review by this Court.

Petitioner contends (Pet. 4, 6) that his separation was improper because the Defense Intelligence Agency failed to classify his position as "Intelligence Research Specialist (Cultural Geography)" in the same competitive level with two allegedly interchangeable positions, denominated "Intelligence Research Specialist (Urban Affairs)".[1] He asserts that the agency excessively restricted his competitive level and

[1] In a reduction-in-force, employees compete for retention only within their competitive level and competitive area. 5 C.F.R. 351.201(a), 351.402(a), 351.403(a). Petitioner does not challenge the Commission's determination of his proper competitive area.

that its failure to permit him to compete for those two positions was arbitrary and capricious.

The applicable reduction-in-force regulation, 5 C.F.R. 351.403, provides that different positions should be placed in the same competitive level only when they are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the agency's work program. The Defense Intelligence Agency found that petitioner's position was not mutually interchangeable with the other positions cited by him. The Commission's Appeals Examining Office sustained this finding, concluding that while petitioner might be able to do the work of the two cited positions, the incumbents of those positions could not perform the duties of his position without undue interruption of the Agency's business because of the difference in functions, degree of geographic specialization, and required knowledge and skills (Pet. App. 2b). The administrative record amply supports this determination (Pet. App. 3c-5c). See *Bortin* v. *United States*, 138 F. Supp. 251 (Ct. Cl.); *Barberi* v. *United States*, 144 Ct. Cl. 573. Therefore, the court below properly held that the Commission's decision was not arbitrary and capricious.

Petitioner also contends (Pet. 7) that his position was distinguished from the two allegedly interchangeable positions by a falsified competitive level descrip-

tion, purportedly entered after the completion of the remainder of his position description. But the circumstances under which the Defense Intelligence Agency determined the competitive levels of these positions, which are described in the administrative record (Pet. App. 3c-5c), fully establish that there was no impropriety in the reclassification of petitioner's former position. Petitioner's contrary assertion raises a purely factual question that does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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